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No. 80-1765

In The Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner-Respondent*

v.

HYDROLEVEL CORPORATION, *Respondent-Petitioner*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD R. TYLER, JR.
Attorney for The American Society of Mechanical Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Of Counsel:
RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS

Petitioner-Respondent The American Society of Mechanical Engineers ("ASME") respectfully submits this Reply Brief in response to the Brief in Oposition filed by Respondent-Petitioner Hydrolevel Corporation ("Hydrolevel"), opposing ASME's Petition for a Writ of Certiorari, Dkt. No. 80-1765. ASME's Petition seeks review of the liability portion of the Second Circuit's opinion in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980). ASME has previously submitted a Brief in Opposition to Hydrolevel's separate Petition for Certiorari, Dkt. No. 80-1771, seeking review of the damages portion of the Court of Appeal's decision.

ARGUMENT

In ASME's Petition for review of that portion of the Second Circuit's opinion concerning antitrust liability, ASME's reasons for granting the Writ were squarely within those contemplated by Supreme Court Rule 17: The panel's decision — holding a corporate defendant liable as an "unintentional" participant in an anticompetitive conspiracy based upon the "apparent authority" of a disloyal agent — establishes an unprecedented new standard for vicarious liability under the federal antitrust laws which flatly contradicts every decision of this Court and of every Court of Appeals which has addresed this issue. *See* ASME Petition ("ASME P.") at 10-22. Furthermore, the panel's decision will be devastating to innumerable non-profit, voluntary membership organizations that rely on the efforts of volunteers to contribute immense benefits to the American public. *See* ASME P. at 22-24. This point in particular is underscored by the many *amicus curiae* briefs filed in support of ASME's Petition.

In opposition to ASME's Petition, Hydrolevel makes two principal arguments, both of which are completely without merit. First, Hydrolevel argues that the panel's extended discussion of "apparent authority" as a basis for antitrust liability was unnec-

essary to its decision, since the panel "could have" affirmed the finding of liability on other grounds. *See* Hydrolevel Brief in Opposition ("H. Br.Opp.") at 5-6. This argument misstates both the holding and the precedential effect of the opinion.

The panel unequivocally held that an organization may be liable for "unintentional participation" in an antitrust conspiracy if its agents were acting within the scope of their "apparent authority" when they committed anticompetitive acts, even if (a) the acts were neither authorized nor ratified by the organizaion, (b) the agents did not intend to, and did not in fact, benefit the organization by the actions, and (c) the agents actively deceived the organization for their own purposes and benefit, thereby preventing the organization from having knowledge of their motives and acts. This unprecedented "apparent authority" standard for vicarious liability in antitrust cases is now the law in the Second Circuit. Since the standard under which a corporation may be liable for the acts of its agents is relevant to almost every antitrust case in which a corporation is a defendant, henceforth rulings on the sufficiency of evidence and instructions to the jury will be governed by this standard in the Second Circuit and by the traditional standard in every other Circuit that has addressed this issue. *See* ASME P. at 15-22. Hydrolevel cannot and does not even attempt to refute ASME's demonstration that there is an irreconcilable conflict between the panel's decision in this case, on the one hand, and this Court's decisions in *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922) and *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U.S. 295 (1925), as well as every applicable decision of the federal Courts of Appeals, on the other hand. Accordingly, this Court should review the Second Circuit panel's decision and resolve this significant and far-reaching conflict.*

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*In addition, Hydrolevel's argument that the panel "could have" affirmed the finding of liability on other grounds is refuted by the opinion itself. In particular, the notion that ASME somehow "ratified" the conspiratorial activities of M&M, James and Hardin after it discovered them was implicity rejected by the panel, which noted that "ASME's sole contribution to the conspiracy was the April 1971 letter", A-23, and that ASME freed itself "from further liability" by publishing the June 1972

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Second, Hydrolevel's disingenuous argument that "this Court has repeatedly affirmed the general rule that a civil violation of the antitrust laws may be established by proof *either* of an unlawful intent or of an anticompetitive effect," H. Br.Opp. at 5, and that the panel's "apparent authority" standard is somehow compelled by this "general rule," *id.*, simply misstates the law. In *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), this Court stated, in a footnote, that "a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." *id.* at 436, n.13. In the same opinion, however, the Court emphasized the limited nature of this principle:

> In a conspiracy, two different types of intent are generally required — the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. See W. LaFave & A. Scott, *Criminal Law* 464-465 (1972). *Our discussion here focuses only on the second type of intent.*

Id. at 443, n. 20 (emphasis added). Since this case deals with the standard governing the sufficiency of the evidence of the "intent to agree" or to participate in a conspiracy,* neither *United States Gypsum* nor the other cases relied on by Hydrolevel provide the slightest support for the panel's conclusion that par-

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letter. *Id.* Second, Hydrolevel's suggestion that ASME actively participated in the unauthorized acts of its agents is also inconsistent with the panel's conclusion that its unwitting role in the issuance of the April 1971 letter was its "sole contribution to the conspiracy;" indeed, the panel tacitly accepted (as it must) ASME's argument that no one at ASME had any knowledge of the scope of Hardin and James' disloyal acts until long after they had been committed and corrected.

*In its Brief of Opposition, Hydrolevel asserts that "ASME candidly acknowledges that there existed a conspiracy to restrain trade *and to monopolize*, as found by the jury in this case, and that the ASME participated in this conspiracy." H. Br.Opp. at 5. This statement is absolutely false. The focus of ASME's entire argument in both the trial court and in the Court of Appeals was that there was no evidence that ASME knowingly and intentionally participated in *any* conspiracy.

ticipation in an antitrust conspiracy can be based exclusively on the unauthorized, disloyal acts of volunteer members who intended only to benefit themselves and a third party.

In summary, Hydrolevel has raised no valid reasons why ASME's Petition for a Writ of Certiorari should not be granted.

CONCLUSION

In view of the foregoing, and for the reasons stated in ASME's Petition and the fifteen *amicus curiae* briefs submitted in support thereof, ASME's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD R. TYLER, JR.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Attorney for The American Society of Mechanical Engineers, Inc.

Of Counsel:

RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN

PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

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